

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

TL-N-2011-00  
[REDACTED]

date: May 2, 2000

to: Chief, Examination Division, [REDACTED]  
Attn: [REDACTED], Group Manager, Group [REDACTED]

from: District Counsel, [REDACTED]

subject: [REDACTED]  
Validity of Forms 872

Our advice has been requested as to the validity of the Forms 872 described below. For the reasons discussed, we believe that the Forms 872 are valid.

FACTS

[REDACTED] (" [REDACTED] ") is a CEP taxpayer. [REDACTED] has a 52/53 week fiscal and taxable year ending on the Saturday nearest December 31. Exam is currently conducting an examination of [REDACTED]'s taxable years [REDACTED], [REDACTED], and [REDACTED]. The company's taxable years [REDACTED], [REDACTED], and [REDACTED], ended on December 30, [REDACTED], December 28, [REDACTED], and January 3, [REDACTED], respectively.

Notwithstanding the fact that [REDACTED] has a 52/53 week taxable year, its returns the years currently under examination reflected a calendar year ending December 31. No entry was made on the top line of the first page the [REDACTED] Form 1120 which reads "For calendar year [REDACTED] or year beginning [REDACTED] 19 [REDACTED] ending [REDACTED] 19 [REDACTED]." Where the taxable year was to be filled-in on the attached schedules, the taxable year December 31, [REDACTED], was inserted. On the Form 7004 [REDACTED] filed to extend the time to file its return for [REDACTED], the taxpayer specifically checked the "calendar year" box. The Forms 1120 and 7004 filed for the taxable years [REDACTED] and [REDACTED] similarly indicated a December 31 year end.

A Form 872 extending the statute of limitations on assessment for [REDACTED]'s taxable year [REDACTED] to [REDACTED], was executed on behalf of the company and the Service on [REDACTED], and [REDACTED], respectively. On the line of the Form 872 for the period to which the extension applied was inserted "December 31, [REDACTED]." But for the execution of the Form 872, the general 3-year statute of limitations for [REDACTED]'s taxable year [REDACTED] would have expired on [REDACTED].

A second Form 872, this one for the taxable years [REDACTED] and [REDACTED], was subsequently secured. The second Form 872 reflected that it was for the periods "December 31, [REDACTED] and December 31, [REDACTED]."

But for the second Form 872, the general 3-year statute of limitations for [REDACTED]'s taxable year [REDACTED] would expire on [REDACTED].

[REDACTED] has been under continuous examination for a number of years. The historical files reflect December 31 calendar year end. It was only subsequent to the execution of the Forms 872 that exam became aware that [REDACTED] has a 52/53 week year.

### DISCUSSION

I.R.C. §6501(c)(4) provides that the statute of limitations on assessment can be extended where "the Secretary and the taxpayer have consented in writing" to such an extension. A consent is not a contract; however, contract principles are significant in interpreting a consent because section 6501(c)(4) requires a written agreement. Piarulle v. Commissioner, 80 T.C. 1035 (1983).

The consents in issue state that they are for the taxable years ending December 31, [REDACTED], and December 31, [REDACTED], however, had no such taxable years; its taxable years [REDACTED] and [REDACTED] ended December 30, and December 28, respectively. In our view, this error creates, at most, a latent ambiguity (that is an ambiguity which is not apparent on the face of the document itself). Where a consent contains a latent ambiguity, the courts will admit extrinsic evidence to determine the parties' intent and resolve the ambiguity. Constitution Publishing Co. v. Commissioner, 22 B.T.A. 426 (1931). Under the facts of this case, we believe that a court would have no difficulty concluding that the parties intended the consents to apply to [REDACTED]'s taxable years [REDACTED] and [REDACTED] notwithstanding the fact that the year end dates on the consents were incorrect. Even if a court did not find that the consents contained a latent ambiguity, the present facts would constitute a mutual mistake which could be equitably reformed to comport with the parties' actual agreement.<sup>1</sup> Woods v. Commissioner, 92 T.C. 776 (1989). (A mutual mistake exists "where there has been a meeting of the minds of the parties and an agreement actually entered into but the agreement in its written form does not express what was really intended by the parties." Black's Law Dictionary, p. 920 (5<sup>th</sup> ed. 1979).) We note that the courts have upheld consents with errors as to the taxable year to which they on facts less favorable than those of the present case. See, e.g., Buchine v. Commissioner, 20 F.3d 1730 (5<sup>th</sup> Cir. 1994) (consent gave taxable year as "December 31, 1984" not "December 31, 1981"); Durgin V. Commissioner, T.C. Memo. 1992-656 (space for taxable year not filled-in); Atkinson v. Commissioner, T.C. Memo. 1990-37 (consent gave taxable year as "December 31, 1984," not "December 31, 1981").

---

<sup>1</sup> In the unlikely event the taxpayer were to claim that it knew of the error at the time the consent were executed, the taxpayer would likely be equitably estopped from arguing the consents were invalid.

- 3 -

Although we believe that the consents in issue are valid, now that the error has been discovered, a new Form 872 should be obtained from the taxpayer reflecting the correct year-end dates for [REDACTED] and [REDACTED] prior to the expiration of the statute for [REDACTED].

If you have any questions respecting this matter, please call [REDACTED] at [REDACTED].

[REDACTED]  
District Counsel

By: [REDACTED]

Special Litigation Assistant

cc: Assistant Chief Counsel  
(Field Service)